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SYMPOSIUM

COMMON LAW ENVIRONMENTAL PROTECTION

INTRODUCTION

Jonathan H. Adler[†] & Andrew P. Morriss[‡]

Many factors led to the growth of environmental regulation in the 1960s and 1970s, including the perceived failure of preexisting institutions to provide adequate levels of environmental protection.¹ In the decades following World War II, state governments began enacting broad regulatory schemes to control the environmental effects of private industrial activity. The federal government followed soon thereafter, erecting the basic architecture of contemporary federal environmental law. Beginning in 1969, Congress enacted a flurry of environmental statutes, including the National Environmental Policy Act,² the Clean Air Act,³ the Clean Water Act,⁴

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¹ For one account of the growth of federal environmental regulation, see Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE WES. RES. L. REV. 93 (2004).

² 42 U.S.C. §§ 4321–4347 (2000).

³ 42 U.S.C. §§ 7401–7661f (2000). The first federal air pollution legislation was actually enacted in 1955 (Pub. L. No. 80-159), and amended in 1963, 1965, 1966, and 1967. With a few exceptions, however, such as the creation of federal emission standards for new automobiles mandated in 1967, the pre-1970 statutes were largely non-regulatory in nature. As a consequence, the 1970 Act is commonly referred to as *the* “Clean Air Act.”

⁴ 33 U.S.C. §§ 1252–1385 (2000). The Clean Water Act is formally known as the Federal Water Pollution Control Act.

the Endangered Species Act,⁵ the Federal Insecticide, Fungicide, and Rodenticide Act,⁶ the Resource Conservation and Recovery Act,⁷ the Safe Drinking Water Act,⁸ and the Toxic Substances Control Act.⁹ Commentators regularly cite the failure of common law institutions to protect environmental values as a reason for the adoption of prescriptive environmental measures during this period.¹⁰ It was well understood that "the traditional common law remedies were utterly inadequate to deal with contemporary environmental problems."¹¹ As a leading environmental law casebook explains, environmental legislation was, in part, driven by "dissatisfaction" with the common law's capacity to address "modern concerns about environmental quality."¹²

Today there is widespread dissatisfaction with many aspects of federal environmental law.¹³ The apparent success of early environmental regulations notwithstanding, many analysts and academics have begun to reexamine the potential of common law causes of action to supplement, if not supplant, portions of the

⁵ 16 U.S.C. §§ 1531–1544 (2000).

⁶ 7 U.S.C. §§ 136–136y (2000).

⁷ 42 U.S.C. §§ 6901–6992k (2000).

⁸ 42 U.S.C. §§ 300f–300j (2000).

⁹ 15 U.S.C. §§ 2601–2671 (2000).

¹⁰ See, e.g., N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 195 (1966) (noting the inadequacy of private legal remedies to control water pollution); Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 GEO. MASON L. REV. 965, 977 (1999) ("the common law era saw some of the most dramatic pollution episodes."); Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL'Y F. 9, (1998) (tracing history of major environmental statutes to national media attention that made a particular market failure appear politically important). See also James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23 (2000) (tracing history of environmental law as a discipline).

¹¹ Joseph L. Sax, *Introduction*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT xvii (Clifford Rechtstaffen & Denise Antolini eds. 2007). See also, RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 114 (2004) ("Traditional tort doctrine proved unable to provide meaningful redress to the new class of environmental injuries.").

¹² ROBERT PERCIVAL, ET AL., *ENVIRONMENTAL PROTECTION: LAW, SCIENCE AND POLICY* 1018 (2d ed. 1996).

¹³ See, e.g., Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153, 154 (1988) ("the system has grown to the point where it amounts to nothing less than a massive effort at Soviet-style planning of the economy to achieve environmental goals"); J. CLARENCE DAVIES & JAN MAZUREK, *REGULATING POLLUTION 2* (1997) ("For all its accomplishments, we conclude the pollution control regulatory system is deeply and fundamentally flawed."); Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 ENVTL. L. REP. 10148, 10148 (1999) ("The current system . . . is inadequate for the challenges ahead."); Debra S. Knopman & Marc K. Landy, *A New Model of Governance*, BLUEPRINT, Fall 2000 (environmental regulations "are increasingly inefficient in a fast-paced economy and too rigid" to address current ecological concerns).

existing regulatory regime.¹⁴ Some environmental advocates have come to the conclusion that state-based tort law may be more protective than federal regulations.¹⁵ At the same time, private litigators and state attorneys general are reviving common law causes of action in an effort to augment existing regulatory controls.¹⁶

One group seeking a reexamination of the common law's environmental potential is supporters of property and market-based approaches to environmental problems (including the two of us).¹⁷ Such so-called "free market environmentalists" have argued since the 1990's that the common law provides an important source of environmental protection capable of solving many environmental problems through the protection of private property rights.¹⁸ Some

¹⁴ See generally CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT (Clifford Rechtstaffen & Denise Antolini eds. 2007).

¹⁵ See, e.g., William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1556 (2007) ("The common law system's independence and private incentives to challenge the status quo are particularly valuable antidotes to complacency and ineffective regulation."); Jason J. Czarnecki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 35 (2007) ("State common law doctrines can effectively determine what is an unreasonable act using state promulgated environmental standards, and provide for alternative or additional remedies. Meanwhile, judicially crafted remedies like the common law fund-allowing portions of state court damages to be paid to a restoration fund-can effectively promote both restoration and deterrence where federal action has proven less than effective."); Tom Kuhnle, Note, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STANF. ENVTL. L. J. 187, 229 (1986) (concluding "common law actions currently stand as an alternative to the arbitrary rules, delays, and poor drafting accompanying CERCLA.") On the other hand, some have seen a "neoconservative effort to rewrite the common law of property to cripple government's ability to control rapacious land development, protect the environment, and rein in unethical corporations." Michael L. Rustad, Book Review, 40 TRIAL 74 (2004) (reviewing JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* (Penguin Books 2005) (2004)).

¹⁶ See, e.g., Sax, *supra* note 11, at xix (observing "committed and creative lawyers . . . have reengineered the old causes of action to make them potent new tools for dealing with some of the gravest and most persistent environmental problems we face.").

¹⁷ See, e.g., Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 NYU J.L. & LIBERTY 987 (2005); Jonathan H. Adler, *Free and Green: A New Approach to Environmental Protection*, 24 HARV. J.L. & PUB. POL'Y 653 (2001); *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001); ECOLOGY, LIBERTY & PROPERTY: A FREE MARKET ENVIRONMENTAL READER (Jonathan H. Adler ed. 2000); Andrew P. Morriss, *Real People, Real Resources, & Real Choices: The Case for Market Valuation of Water*, 38 TEXAS TECH. L. REV. 973 (2006); Andrew P. Morriss & Roger E. Meiners, *Market Principles for Pesticides*, 28 WM. & MARY ENVTL. L. & POLICY REV. 35 (2003); Andrew P. Morriss, Terry L. Anderson, & Bruce Yandle, *Principles for Water*, 15 TULANE ENVTL. L. J. 335 (2002).

¹⁸ The canonical references on common law and the environment are Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems*, 46 CASE W. RES. L. REV. 961 (1996); BRUCE YANDLE, *COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT: CREATING WEALTH IN HUMMINGBIRD ECONOMIES* (1997); Roger Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUB. CHOICE 99 (1998); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON

suggest common law approaches could even be superior in many respects to statutory schemes like the Clean Air Act, the Clean Water Act, or Comprehensive Emergency Response, Cleanup and Liability Act, aka "Superfund."¹⁹ Even before that, classical liberal writers and law and economics writers often made the case that the common law in general was superior to statutory law in many respects.²⁰

This revival of interest in the common law among free market environmentalists prompted some more sophisticated arguments that the common law is inadequate to deal with modern environmental problems from some authors.²¹ Others suggest that recognition of the common law's strengths could reinvigorate or enhance existing environmental controls.²² Few, however, have suggested that common law measures could replace the current reliance upon administrative regulation. Indeed, most environmental law scholarship continues to assume that "the foreseeable future holds the administrative state in place," and a return to the common law is unlikely.²³

Is the common law a viable means of addressing environmental problems? The first wave of environmental common law scholarship,

L. REV. 923 (1999); THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger Meiners & Andrew P. Morriss, eds. 2000); Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 WASHBURN L. J. 515 (2002). See also TERRY L. ANDERSON AND DONALD R. LEAL, FREE-MARKET ENVIRONMENTALISM 138 (Rev. Ed. 2001) (advocating common law protections as a "property rights approach to pollution").

¹⁹ See, e.g., Richard L. Stroup, *Superfund: The Shortcut that Failed*, in BREAKING THE ENVIRONMENTAL POLICY GRIDLOCK (Terry L. Anderson ed., 1997) (arguing CERCLA was a step backward for environmental protection and waste site cleanup).

²⁰ The classical liberal case for the common law was made in BRUNO LEONI, FREEDOM AND THE LAW (3rd ed. 1991); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960), and FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY, VOLUME 1: RULES AND ORDER (1978). The law and economics literature on the efficiency of the common law is vast, but traces most of its arguments to RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1st ed. 1973) and Paul H. Rubin, *Why Is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977). See also Paul H. Rubin, *Why Was the Common Law Efficient?*, in THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 383 (Francesco Parisi & Charles K. Rowley, eds. 2005) (summarizing literature).

²¹ See, e.g., Peter S. Menell, *The Limitations of Legal Institutions for Addressing Environmental Risks*, 5 J. ECON. PERSP. 93 (1991); Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 GEO. MASON L. REV. 965 (1999) (arguing that the common law is flawed in addressing environmental problems due to capture issues); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L. J. 583 (2002); Andrew McFee Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L. J. 1329 (1996).

²² David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger Meiners & Andrew P. Morriss, eds. 2000).

²³ J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L. J. 757, 830 (2003).

together with the law and economics and classical liberal literatures, at least put the issue on the table for discussion. The response from the critics raised some important criticisms, ones that needed to be answered. Whatever the failings of the environmental regulatory state, the common law has failings of its own, including the failure to protect many ecological resources in the period before the enactment of federal environmental law. In some instances administrative regulation may have hampered or “sabotaged” common law protections, but in others the common law failed on its own.²⁴

With the generous support of the Roe Foundation for the Property and Environment Research Center, we sought to expand the literature beyond the first round of discussion and to prompt a serious look at the common law’s potential, and potential weaknesses, in addressing environmental problems. We wanted to know where the case for the common law stood. The result is the set of articles and comments by the impressive group of authors included in this symposium.

The stage is set by Professor Steven Eagle’s *The Common Law and the Environment*, with an analysis centered on the role of property law within the common law. Eagle points to the incremental nature of the common law and to its location of decisions close to the dispute as crucial reasons to believe that the common law can escape from the special interest traps that bedevil statutory law and administration regulations. Eagle provides the foundation upon which the case for the common law must rest.

Next, Stuart Buck asks how the common law has fared in the courts in addressing actual environmental problems in *The Common Law & The Environment in the Courts*. After a brief survey of the common law causes of action available, Buck finds that assessments of the common law’s record are hampered by a lack of agreement on what a “good” outcome is. One might argue that the common law “works” when it produces the most environmental protection possible. But such a definition fails the test of reasonableness, since marginal benefits and costs matter. And even if we had a common definition of success, Buck notes that there is little data against which to test any hypotheses about the common law. Without either a solid yardstick or data, Buck argues that we have to fall back on assessments of particular situations where the institutional strengths and weaknesses of the common law can give us some confidence that

²⁴ See, e.g., Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. REV. 89, 119–26 (2002) (discussing how state environmental regulations preempted public nuisance actions against local water pollution and how private nuisance actions were impotent against the widespread industrial pollution of the Cuyahoga River).

we can say something meaningful about the type of outcomes we might expect from common law suits.

Professor Bruce Yandle, an economist—and one of the first to argue for a primary role for the common law—finds much to agree with in Buck's analysis of the gaps in our knowledge about how well the common law (or statutory law) works. But Yandle insists we can go further than Buck's ultimate agnosticism on the common law's merits. If we dig into the incentive structures of common law and statutory law, Yandle suggests, we will find reason to prefer the former to the latter.

Professor Denise Antolini has a less favorable view of Buck's analysis, suggesting Buck is focused on the wrong questions. Antolini critiques Buck's focus on whether common law remedies could provide a substitute for administrative regulation. The more appropriate questions, according to Antolini, are how and when common law remedies can complement or supplement existing environmental regulations. In particular, she faults Buck for ignoring the "interstitial and catalytic" character of contemporary common law litigation, which leads him to underestimate the common law's value in environmental protection.

Professor Keith Hylton applies law and economics analysis to the problems of nuisance law and proposes a modification of traditional nuisance law to improve the common law's ability to address environmental problems in *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*. Nuisance law has been cited both in support of the common law's role²⁵ and as an example of a doctrine whose time has passed.²⁶ Hylton builds a new analysis of nuisance law from the insights of law and economics on agency costs, activity levels, and the level of care. Hylton argues that nuisance law has the potential to do a better job than a statutory alternative in some cases.

Professor Henry Butler adopts what one might call an "Austrian" perspective²⁷ on the virtues of common law environmental protection

²⁵ See, e.g., *Common Law and the Conceit of Modern Environmental Policy*, *supra* note 18, at 926-935 (making the case for nuisance law's role).

²⁶ See, e.g., *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992) (Kennedy, J. concurring) (arguing that the "common law of nuisance is too narrow a confine for the exercise of a regulatory power in a complex and interdependent society.").

²⁷ "Austrian" in that Professor Butler's analysis emphasizes the role of the common law as a discovery mechanism that generates useful information about the nature and extent of environmental problems and subjective preferences with regard to environmental values. See, for example, the work of noted "Austrian" economist F. A. Hayek on the role of information in a market economy. F. A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519 (1945).

in *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*. Whereas other advocates of common law measures may stress their efficiency or particularity, Butler stresses the role of the common law as a discovery process. Butler suggests that the common law, when combined with competitive federalism, allows for the evolution of superior institutions for environmental protection over time. Although many common law causes of action remain intact, Butler suggests this evolution is hampered by the mere existence of an over-arching environmental regulatory system.

Professor J.B. Ruhl offers an alternative argument for nuisance's relevance to contemporary environmental issues in *Making Nuisance Ecological*. He argues that nuisance law is well suited to address situations where one landowner uses her land to deprive another of the valuable services provided by a healthy ecosystem. Ruhl argues that the adaptability of the common law makes it ideal for bringing new knowledge into the legal analysis of environmental issues.

Professor John Copeland Nagle examines Ruhl's analysis through the history of nuisance law's treatment of wetlands. Noting that nuisance law first categorized wetlands as nuisances themselves, Nagle is less optimistic than Ruhl that a transformation of nuisance law into a protector of ecosystems has already occurred. Nonetheless, he is hopeful that nuisance law's flexibility can lead to better outcomes as it incorporates new ideas about ecosystems within the doctrine's parameters.

Professor James Huffman takes a less sanguine view of Ruhl's effort to expand common law remedies and its potential effect on private property rights. To Huffman, the recent environmentalist embrace of the common law generally, and public nuisance law in particular, poses a threat to the constitutional protection of property rights and will unsettle the once-settled expectations that more traditional applications of the common law sought to protect. As a consequence, Huffman suggests, such approaches to common law environmentalism threaten to undermine the ability of common law institutions to allocate scarce resources in an efficient and environmentally protective manner.

To assess where the case for the common law stands, we invited Professor David Schoenbrod to synthesize the lessons learned from this symposium. Schoenbrod's career has spanned the roles of litigator for an environmental group and professor/commentator on the law's developments.²⁸ In 2000, Schoenbrod wrote a chapter in a

²⁸ See generally, DAVID SCHOENBROD, SAVING THE ENVIRONMENT FROM WASHINGTON

book one of us edited, making a qualified case—an agnostic's case—for the common law²⁹ and which prompted our selection of him as our concluding author. Schoenbrod remains an agnostic, but his reflection here points in the direction of greater particularity as a virtue for solutions to environmental problems generally. Given that the common law's strength is particularity, it seems to us that the case for the common law is a bit stronger today than it was in 2000.

Is the common law *the* solution to all environmental problems? Of course not—no more than the Clean Air Act is *the* solution to air pollution or the Endangered Species Act is *the* one best way to protect endangered species. Is the common law *a* solution worth looking at as we wrestle with a wide range of environmental issues? We think the papers in this symposium advance the argument that the common law offers a serious option, whether alone or in combination with other measures, for addressing important environmental concerns. The arc of the story of the common law's role is not simply from ineffective institution to historical relic supplanted by statute. Rather, there is potential for the common law, and the underlying institution of private property rights, to play a greater role in mediating the conflicts over resource use that are at the heart of environmental law. There is greater appreciation today for the institutional strengths of the common law, both among proponents of markets and, increasingly, among some more skeptical of market solutions. This appreciation is not uncritical, however, and the case for the common law remains to be articulated in particular instances based on the different facts and institutions at play with respect to different problems.

(2005) (discussing his career in environmental policy).

²⁹ David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* (Roger Meiners & Andrew P. Morriss, eds. 2000).